IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-5328

DONALD WAYNE THOMAS,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether Petitioner was denied due process of law because the trial court did not conduct an evidentiary hearing as to his competency to stand trial where no bona fide doubt as to Petitioner's competency was raised?

II.

Whether the trial court's instructions at the sentencing phase regarding the statutory aggravating circumstance adequately channeled the jury's consideration of the death penalty?

III.

Whether the Georgia Supreme Court constitutionally applied and limited the terms "torture" and "depravity of mind" in upholding the aggravating circumstance which supports the death penalty in this case?

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PART ONE

STATEMENT OF THE CASE

Petitioner was indicted in Fulton County, Georgia, in May, 1979, for the murder of a nine year old boy. Following a trial by jury, Petitioner was convicted of murder, and the jury imposed the death sentence on October 25, 1979. On direct appeal, the Georgia Supreme Court affirmed the conviction and death sentence. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980). After this court's decision in Godfrey v. Georgia, 446 Ga. 420 (1980), the death sentence in this case was vacated and the case was remanded by this Court to the Georgia Supreme Court for reconsideration in light of the Godfrey decision.

Thomas v. State, 449 U.S. 988 (1980). Upon remand, the Georgia Supreme Court reaffirmed the death sentence. Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981), cert den., 452 U.S. 973 (1981).

Petitioner next sought State habeas corpus relief which was denied by the Superior Court of Butts County, Georgia in a lengthy, unpublished opinion. (See Petitioner's Appendix). On June 2, 1982, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal.

PART TWO

SUMMARY OF ARGUMENT

I.

The trial court was not constitutionally required to conduct an evidentiary hearing on the question of Petitioner's competency to stand trial because there was no evidence of prior irrational behavior, Petitioner's trial demeanor did not raise any doubt as to his competency and the one psychiatrist who found Petitioner incompetent to stand trial four months prior to trial abandoned that opinion in the week preceeding trial.

II.

The trial court's instructions, at the sentencing phase, regarding the statutory aggravating circumstance, which parallelled the statutory language properly guided the sentencing authority's discretion in accordance with this Court's decisions.

III.

The Georgia Supreme Court's detailed opinion, on remand from this Court, which upheld the application of the (b)(7) aggravating circumstance, did not employ an unconstitutionally overbroad definition of "torture" and "depravity of mind."

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT WAS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE THE PETITIONER WITH AN EVIDENTIARY HEARING ON THE ISSUE OF COMPETENCY TO STAND TRIAL.

Petitioner maintains that he was deprived due process of law because an evidentiary hearing on his competency to stand trial was not conducted in the trial court. Respondent maintains that under the relevant criteria set forth in the decisions of this Court, no bona fide doubt as to Petitioner's competency was raised.

The record in the present case indicates that the trial court ordered a psychiatric examination of Petitioner within one week of Petitioner's arrest. (R. 5). Pursuant to this Order, Petitioner was examined on June 1, 1979 by Dr. Baccus who concluded that Petitioner was "unable to actively participate in the legal proceedings" and recommended treatment at an in-patient psychiatric facility. (R. 6-7). Petitioner's attorney then entered a special plea of insanity and filed a Motion for Transfer to a State psychiatric facility. (R. 8-11). On or about August 7, 1979, Petitioner was examined by a second psychiatrist, Dr. Cohen, who was unable to reach a definitive conclusion regarding Petitioner's ability to assist in his defense and Dr. Cohen suggested extensive observation at a State hospital. (R. 14-15). Dr. Cohen noted that Petitioner "initially seemed to be pretending not to understand to comprehend anything that was asked of him" and suggested that Petitioner might have simulated to a greater extent at his earlier interview with Dr. Baccus.

Respondent maintains, as the State habeas court concluded, that none of these factors are present here. There is no contention that Petitioner has a history of irrational behavior, to the contrary, Petitioner's numerous witnesses at the State habeas hearing testified without exception that they characterized Petitioner as "normal." Petitioner argues that his demeanor at trial raised doubts because Petitioner continually exhibited a raised fist while sitting at the defense table; however, Petitioner's attorney characterized this gesture as similar to a black power salute and did not equate it with incompetency. (H.T., p. 61). Finally, the report of the psychiatrist, who had the opportunity to observe Petitioner over a one month period immediately preceding trial, specifically found Petitioner competent to stand trial. The psychiatrist who found Petitioner incompetent to stand trial over four months before trial had opined that transfer to an in-patient psychiatric facility could eliminate Petititioner's "psychotic symptoms" which rendered him incompetent to stand trial in early June, 1979.

Accordingly, no bona fide doubt having been raised regarding Petitioner's competency at the time of trial, Petitioner's contention that an evidentiary hearing was constitutionally mandated is without merit.

(R. 14). After receiving Dr. Cohen's letter, the trial judge ordered that Petitioner be transferred to Central State Hospital on August 10, 1979. (R. 13). After approximately one month at the State facility, Dr. Delatorre concluded that Petitioner was competent to stand trial, able to distinguish right from wrong and not laboring under delusion at the time of the incident. (R. 16-17). Dr. Delatorre also noted that Petitioner was in the boarderline classification in terms of intelligence, had no history of prior psychiatric disturbances and was diagnosed as a latent schizophrenic. Id. Petitioner's trial attorney testified at the State habeas hearing that in the week before trial, Dr. Baccus told him that Petitioner was competent to stand trial, therefore, the special plea was abandoned due to lack of evidence. ("H.T.", pp. 16, 52).

Relying on the earlier decision in Pate v. Robinson, 383 U.S. 375 (1966), this Court has identified three pertinent factors in determining whether further inquiry as to the accused's competency to stand trial is constitutionally mandated:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. Drope v. Missouri, 420 U.S. 162, 180 (1975).
>
> Also see Chenault v. Stynchcombe, 546 F.2d 1191 (1977), cert den., 434 U.S. 878 and Pedrero v. Wainwright, 590 F.2d 1383 (1979), cert den., 444 U.S. 943.

II. THE TRIAL COURT'S INSTRUCTIONS AT THE SENTENCING PHASE ADEQUATELY GUIDED AND CHANNELED THE JURORS' CONSIDERATION OF THE DEATH PENALTY.

Petitioner maintains that the trial judge's instructions at sentencing, regarding aggravating circumstances, are constitutionally insufficient and that the Eighth Amendment requires more than an instruction in the statutory language.

At the sentencing phase, the trial judge instructed the jury that the death penalty may be imposed if the jury finds beyond a reasonable doubt the existence of a statutory aggravating circumstance. (T.T., p. 565). The trial judge continued:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind. (T.T. 565).

This instruction is essentially the statutory language of Ga. Code Ann. § 27-2534.1(b)(7).

Petitioner argues, without benefit of authority, that instructions couched in the statutory language of (b)(7) are constitutionally insufficient to guide the sentencing authority's discretion. This court has implicitly rejected this argument in both the Gregg and Godfrey decisions. See Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980). In Gregg, the Petitioner's argument that the (b)(7) language was unconstitutionally broad, was rejected by this Court's opinion

which concluded "But this language need not be construed in this way." Gregg v. Georgia, supra, 428 U.S. at 201. In the Godfrey opinion, this Court again considered the (b)(7) aggravating circumstance but did not mandate instructions to the jury beyond that set forth in the statute. In Godfrey, the jury simply found that the murders were "outrageously or wantonly vile, horrible and inhuman," which lead this Court to the conclusion that their discretion was impermissibly unchanneled. Godfrey v. Georgia, supra, 446 U.S. at 428-29. In the present case, the jury returned the following finding:

> We, the jury, recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt: That choking and strangling of a nine year old child causing asphyxiation by the defendant, was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind. (T.T., p. 571 and R. 116, 118).

This finding clearly indicates the facts which lead the jury to conclude that the murder involved torture and depravity, as well as being outrageously wanton and vile.

Based on the foregoing, Petitioner does not present any argument which merits consideration by this Court.

III. THE GEORGIA SUPREME COURT EMPLOYED A PROPERLY LIMITED AND NARROW CONSTRUCTION TO THE TERMS "TORTURE" AND "DEPRAVITY OF MIND" IN UPHOLDING THE AGGRAVATING CIRCUMSTANCE RETURNED BY THE JURY.

As previously noted, this Court remanded this case for further consideration in light of Godfrey v. Georgia, supra. In response to this Court's dictate, the Georgia Supreme Court reexamined the finding of an aggravated circumstance in the present case and in an extensive discussion upheld the finding.

On remand, the Georgia Supreme Court relied on its recently enunciated guidelines in Hance v. Georgia, 245 Ga. 856, 268 S.E.2d 339 (1980), cert den., 449 U.S. 1067. In Hance v. Georgia, the Court held that serious physical abuse prior to death constitutes "torture" under Ga. Code Ann. § 27-2534.1(b)(7), that the act of torture is evidence of depravity and that the victim's age and physical characteristics should be considered in determining depravity. The Court relied on the record in this case which indicated that Petitioner beat the victim with a stick and choked him to death, the victim's tender age (9 years) and slight physical build, as well as, Petitioner's action of jumping on the corpse in the presence of his girlfriend as indicative of torture and depravity shown beyond a reasonable doubt. See Thomas v. Georgia, supra, 247 Ga. 233.

This analysis by the Georgia Supreme Court clearly reveals that the State Court has properly applied the (b)(7) aggravating circumstance under guidelines which distinguish cases such as the present, from the run of "ordinary murders" in which the death penalty should not be imposed.

Accordingly, Petitioner's argument regarding the Georgia Supreme Court's application and construction of the (b)(7) aggravating circumstance does not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Donald Wayne Thomas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the Bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner's counsel by depositing a copy of the same in the United States Mail with adequate postage and properly addressed to:

Mr. Stephen B. Bright
Suite 202
419 7th Street, N.W.
Washington, D.C. 20004

This 29th day of September, 1982.

Janice G. Hildenbrand
JANICE G. HILDENBRAND
Counsel-of-record for Respondent

Accordingly, Petitioner's argument regarding the Georgia Supreme Court's application and construction of the (b)(7) aggravating circumstance does not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Donald Wayne Thomas.

Respectfully submitted,

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This 29th day of September, 1982.

Janice G. Hildenbrand
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Counsel-of-record for Respondent

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CERTIFICATE OF FILING UNDER RULE 28

I, JANICE G. HILDENBRAND, A Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on September 29, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

Janice G. Hildenbrand
JANICE G. HILDENBRAND

Sworn to and subscribed
before me this 29th day
of September, 1982.

Dan Lawson
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires June 11, 1984